NO. 14-17-00685-CR

IN THE COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

NELSON GARCIA DIAZ,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

ON APPEAL FROM THE 228TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
CAUSE NO. 1555099

BRIEF FOR APPELLANT

ORAL ARGUMENT
NOT REQUESTED

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NOTICE OF INTERESTED PARTIES

Pursuant to TEX. R. APP. PROC. 38.1(a), the following is a list of all parties to the trial court's judgment and respective trial and appellate counsel:

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The Honorable Belinda Hill
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Houston, Harris County, Texas

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STATEMENT OF THE CASE

Appellant was charged with several different offenses emanating from the home invasion of a Houston Police Department officer on September 26, 2013. Appellant was initially arrested and charged with Felon in Possession of a Weapon on October 1, 2013 and an additional charge of Aggravated Robbery was filed on February 11, 2014. (DX 1, page 3; DX 2, page 3). Ultimately, the State tried Appellant for Burglary of a Habitation with Intent to Commit Aggravated Assault based on an indictment that was returned on June 13, 2017. (CR 6). Appellant pleaded not guilty before a jury, but was found guilty as charged on August 14, 2017. (RR Vol. 11 at 75; CR 129). The same jury, after finding two enhancement paragraphs true, assessed punishment at 32 years confinement in the Texas Department of Criminal Justice. (CR 137). Appellant gave timely notice of his intent to appeal and the trial court's certification of Appellant's right of appeal certifies Appellant has the right to appeal. (CR 145, 147).

On August 7, 2018, Appellant's appeal was abated for the trial court to produce Findings of Fact and Conclusions of Law. Those determinations were completed by the trial court on December 14, 2018.

Appellant's brief, due February 7, 2019, is timely filed.

REQUEST FOR ORAL ARGUMENT

Appellant does NOT request oral argument. TEX. R. APP. PROC. 39.7

ISSUES PRESENTED

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN ILLEGITIMATE WARRANT TO SEARCH THREE CELL PHONES.

STATEMENT OF FACTS

At approximately 10:00pm on September 26, 2013, Troy Dupuy, an officer with the Houston Police Department, was at home and about to go to sleep when he heard two men breaking down his front door. (RR Vol. 6 at 30, 35). According to Dupuy, the men entered yelling "police" and Dupuy, skeptical that they were law enforcement officers, went to confront them armed with his pistol. (RR Vol. 6 at 46-7). Upon determining the men were in fact not police officers, Dupuy began shooting and one of the intruders returned fire, wounding Dupuy in the leg. (RR Vol. 6 at 53, 58). The men then hastily fled Dupuy's house after inadvertently dropping a pair of sunglasses and a battery and plastic backing from a cell phone. (RR Vol. 6 at 72, 73).

The incident drew intense media scrutiny and, within a few days, a Drug Enforcement Agency confidential informant, who had seen a report on TV, told DEA agents that Appellant was one of the men who had entered Dupuy's house. (RR Vol. 10 at 221). According to the informant, Appellant had intended to rob a drug dealer but went to the wrong house and ended up shooting a man inside. (RR Vol. 7 at 83-4).

DEA agents brought the information to the attention of the Harris County Sheriff's Office, which was the agency responsible for investigating the case. (RR Vol. 10 at 223-4). Based on information provided by the DEA agents, local authorities located Appellant and determined he had an outstanding felony warrant from another state. (RR Vol. 8 at 133; RR Vol. 10 at 155). The Gulf Coast Task Force, a "multi-jurisdictional" law enforcement agency, set up surveillance at an apartment complex where Appellant was believed to be staying and officers watched as Appellant entered a vehicle that drove away from the complex. (RR Vol. 8 at 137, 140). The vehicle was monitored as it turned into a nearby grocery store parking lot. (RR Vol. 8 at 158). Authorities then descended on it, arrested Appellant, and detained the vehicle's other three occupants. (RR Vol. 8 at 164-5).

Several cell phones and other electronic devices were recovered from Appellant's person, from elsewhere in the vehicle, and from the apartment Appellant had left. (SX 101, 102, 103, 141). Almost four years later, most of these devices were searched pursuant to two search warrants. (DX2 & DX 3[1]). Appellant challenged the warrants in a single motion to suppress which the trial court denied *in toto*. (CR 53) (DX 2&3). The State only offered into evidence exhibits obtained as a result of one of the warrants. (SX 203-206; DX 2). The admitted records included damaging information to the defense, including: 1) a photograph of

[1] All search warrant exhibit numbers are based on the reporter's record, not the different numbering in the clerk's record.

Appellant holding a gun; 2) a photograph of Appellant holding a fictitious police badge; 3) call history confirming communications with the DEA informant's phone number; 4) a downloaded media report about Officer's Dupuy's shooting; and 5) several texts from Appellant, subsequent to the incident, indicating Appellant could not find his sunglasses. (SX 203-206).

SUMMARY OF THE ARGUMENT

Appellant objects to the use of evidence recovered as a result of a search warrant for three cell phones found on Appellant's person. (DX 2). As articulated in the search warrant affidavit, the basis for the search was that, in the training and experience of the affiant officer, "the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily," and therefore "stored communication probably exists with the seized phones . . . and the contents of these communications are probably relevant and material to the offenses committed." (DX 2 page 3).

Basically, the basis for searching through the recovered electronics was simply that in today's day and age everybody uses electronics for everything. Therefore, Appellant probably used electronic devices to communicate about his purported crimes and therefore all of the electronic devices accessible to Appellant were subject to an unrestricted search. The problem with this probable cause basis is that the same rationale could justify the unfettered search of virtually any electronics associated with any person suspected of any criminal activity. The

Supreme Court has made clear that the blanket search of an electronic device is not permissible and that a search warrant should not be authorized unless there is probable cause to believe specific evidence will be found in a specific location.

Further compromising the legitimacy of the affidavit providing a basis for the warrant in question, are the intentionally false assertions of the investigating officer. The affidavit incorrectly states the original source of the information implicating Appellant was "anonymous," when in fact the source was a DEA confidential informant whose identity was known to law enforcement. Further, the affidavit insinuates that the investigating officer initiated contact with the DEA about this "anonymous source" when, in fact, it was the DEA that initiated contact with the investigating officer. Particularly troubling, however, is the investigating officer's willingness to misstate his own "training and experience." In the search warrant affidavit, the investigating officer claimed he reached out to the DEA because, in the officer's "training and experience," narcotics cases and home invasion cases are often related. But the truth is that the officer's "training and experience" played no role in the DEA's involvement. Indeed, it was in spite of the investigating officer's initial skepticism that DEA agents were able to convince the officer of their informant's valuable information.

This same officer's "training and experience," as described in the warrant affidavit, was the singular, weak basis for believing the cell phones on Appellant's person would hold evidence of the Dupuy home invasion. Specifically, in the

investigating officer's "training and experience," "individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." And it was based on this dubious "training and experience" that the investigating officer obtained authority to search everything within each of the confiscated electronic devices that could be considered either a "file" or a "fragment" of a file. Given these tremendous problems with the supporting affidavit, the fruits of the search, based upon the warrant in Defense Exhibit #2, should have been suppressed and the trial court erred in admitting State's Exhibits 203-206.

ISSUE NUMBER ONE (Restated)

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN ILLEGITIMATE WARRANT TO SEARCH THREE CELL PHONES.

A. Statement of Facts

At approximately 10:00pm on September 26, 2013, Troy Dupuy, an officer with the Houston Police Department, was at home and about to go to sleep when he heard two men breaking down his front door. (RR Vol. 6 at 30, 35). According to Dupuy, the men entered yelling "police" and Dupuy, skeptical about their status, went to confront them armed with his pistol. (RR Vol. 6 at 46-7). Upon determining the men were not police officers, Dupuy began shooting and one of the intruders returned fire, wounding Dupuy in the leg. (RR Vol. 6 at 53, 58). The men then

hastily fled Dupuy's house after inadvertently dropping a pair of sunglasses and a battery and plastic backing from a cell phone. (RR Vol. 6 at 72, 73).

The incident drew intense media scrutiny and, within a few days, a Drug Enforcement Agency confidential informant, who had seen a report on TV, told DEA agents that Appellant was involved in the incident. (RR Vol. 10 at 221). According to the informant, Appellant had intended to rob a drug dealer but went to the wrong house and ended up shooting a man inside. (RR Vol. 7 at 83-4).

As two DEA agents testified at Appellant's trial, they relayed their informant's information to the lead detective on the case, Harris County Sheriff's Office Deputy D.A. Angstadt. (RR Vol. 10 at 223-4). Angstadt, however, was initially skeptical of the DEA agents and only became interested when the agents described crime scene details not publicly known about the cell phone battery that had been left at the scene. (RR. Vol. 2 at 19-20). After establishing the legitimacy of their informant's claims, the DEA agents and Angstadt discussed the informant's compensation. (RR Vol. 3 at 19). The DEA agents wanted their informant to be paid for his assistance but could not provide compensation for information pertaining to non-DEA investigations—like the Dupuy home invasion. (RR Vol. 3 at 19.) Angstadt also had no mechanism to provide payment. (RR. Vol. 3 at 19). As a result, Angstadt suggested the DEA agents have their informant call Angstadt, routing the call through the Crimestoppers organization in order to seek Crimestoppers reward money. (RR. Vol. 3 at 19). Although "a little shocked" by

the suggestion, the DEA agents agreed and had their informant call Crimestoppers. (RR Vol. 3 at 19). Apparently in order to maintain this prevarication, Angstadt consistently maintained—in the warrant affidavits and in his testimony at Appellant's trial—that the initial information inculpating Appellant came from an "anonymous" source. (DX 2; DX 3; RR Vol. 2 page 44). Further, Angstadt maintained that he had sought out the DEA's involvement, and not the other way around. (DX 2; DX 3; RR Vol. 2 page 44). According to Angstadt, it was simply a coincidence that the "anonymous" tipster was a confidential informant for the same DEA agents he happened to call for assistance with his investigation. (DX 2; DX 3; RR Vol. 2 page 44).

Despite these discrepancies, Angstadt agreed that the DEA's assistance was useful, both in locating Appellant and in determining that Appellant had outstanding felony warrants from another state. (RR Vol. 8 at 133; RR Vol. 10 at 155). Based on the DEA's information, the Gulf Coast Task Force, a "multi-jurisdictional" law enforcement agency, set up surveillance at an apartment complex in Harris County where Appellant was believed to be staying and officers watched as Appellant left the complex in the backseat of a vehicle. (RR Vol. 8 at 137, 140). The vehicle was monitored as it turned into a nearby grocery store parking lot. (RR Vol. 8 at 158). Authorities then descended on it, arrested Appellant, and detained the vehicle's other three occupants. (RR Vol. 8 at 164-5). Three cell phones were found on Appellant's person. (DX 2). Two other cell phones were found within the vehicle, and a

computer and a broken cell phone, missing its battery and backing, were found within the apartment Appellant had just left. (DX 3).

All of the above-described electronic devices were recovered at the time of Appellant's arrest on September 30, 2013. (DX 2 & DX 3). But authorities did not seek to search any of the devices until almost four years later. (DX 2 & DX 3). On June 16, 2017, police obtained two separate warrants, supported by affidavits with nearly identical verbiage, to search each of the above described electronic devices except, for reasons that are not clear in the record, the broken cell phone with the missing battery and backing. (DX 2 & DX 3). The first of the two warrants authorized the search of the three cell phones found on Appellant's person. (DX - 2). The second warrant authorized the search of the other cell phones found in the vehicle where Appellant was arrested, as well as the computer recovered from the apartment Appellant had recently left. (DX 3). Consistent with Angstadt's testimony at Appellant's trial, Angstadt's information in the warrant affidavit wrongly described the DEA informant as an "anonymous" source. (DX 2 & DX 3; RR Vol. 2 at 43).

The supporting affidavits for both warrants, Defendant's Exhibit 2 & 3, were signed by Harris County District Attorney Investigator T. Pham, who averred he had communicated with the investigating detective, D.A. Angstadt. (DX 2 & 3). The relevant portions of each affidavit read as follows:

"On September 30, 2013, Dep. D.A. Angstadt received an anonymous tip that an individual known as 'Jessie' was involved in the home invasion against the Complainant. The tipster provided two phone numbers for the suspect. Based on Dep. D.A. Angstadt's training and experience as a narcotic, robbery and homicide investigator, Dep. D.A. Angstadt knew persons who commit home invasions are commonly involved in the illegal narcotics trade. Dep. D.A. Angstadt spoke with DEA Special Agent Michael Layne and requested SA Layne run the phone numbers through DEA databases. Dep. D.A. Angstadt learned that one of the phone numbers belonged to Defendant Nelson Garcia Diaz." (DX 2 page 2; DX 3 page 3).

The affidavit then requests authorization to search the electronic devices recovered at the time of Appellant's arrest for evidence that might relate to the Dupuy home invasion.

"Your (sic[2]) Dep. D.A. Angstadt has found through training and experience and also through regular human experience that the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily. Therefore, it is Dep. D.A. Angstadt's opinion that stored communication probably exists within the seized cellular phones and computer, and the contents of these communications are probably relevant and material to the offenses committed. It is also the opinion of Dep. D.A. Angstadt that the contents of any identified stored communications, whether they are opened or unopened or listened to or un-listened to, are probably relevant and material to the investigation. Dep. D.A. Angstadt has also found through training and experience that individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." (DX 2 page 3; DX 3 page 5).

On this basis, the Harris County District Attorney's Office Investigator sought to review every conceivable item within each of the described electronic devices.

"It is Deputy D.A. Angstadt's belief, based on my (sic) investigation, that there is probable cause to believe that Defendant may have communicated with other individuals before, during or after the commission of these offenses using his cellular phone or computer. Dep. D.A. Angstadt believes these electronic devices could contain valuable information such as photographs/videos; text or multimedia

[2] The affidavit tracks erroneous boilerplate language occasionally suggesting Deputy Angstadt—and not Investigator Pham— was the affiant.

messages (SMS and MMS); any call history or call logs; any emails, instant messaging or other forms of communication of which said phone is capable; Internet browsing history; any stored Global Positioning System (GPS) data; contact information including email addresses, physical addresses, mailing addresses, and phone numbers; any voicemail messages contained on said phone; any recordings contained on said phone; any social media posts or messaging, and any images associated thereto, including but not limited to that on Facebook, Twitter, and Instagram; any documents and/or evidence showing the identity of ownership and identity of the users of said described item(s); *computer files or fragments of files* (emphasis added); all tracking data and way points; CD-ROM's CD's, DVD's, thumb drives, SD cards, flash drives or any other equipment attached or embedded in the above described device that can be used to store electronic data, metadata and temporary files." (DX 2 page 3; DX 3 page 5).

The warrant that Appellant challenges on appeal authorized the search of the three cell phones found on Appellant's person. (DX 2). Evidence from these electronic devices was admitted in the form of cell phone extracts and photographs in State's Exhibits 203, 204, 205 and 206. State's Exhibit 203, a cell phone extract, showed several communications with the paid informant's number and corroborated the informant's testimony that Appellant and the informant had discussed the home invasion over the phone. (SX 203). State's Exhibit 204, an extract from another phone, contained a photograph of Appellant holding a fake law enforcement badge issued to a person named Jesse Carboni. (SX 204). This photo corroborated testimony from the complainant who said the intruders had entered holding badges and claiming to be police. (RR Vol. 6 at 46-7). The same photo also corroborated testimony from the paid informant who said Appellant went by the name of "Jesse." (RR Vol. 7 at 79). State's Exhibit 204 also showed that a KHOU media account of the home invasion had been downloaded on to the phone. (SX 204). State's Exhibit

205, an extract from the third phone found on Appellant's person, contained several email and social media accounts attached to a person named "Jesse Carboni." (RR Vol. 10 at 172). Additionally, several photographs of Appellant with weapons were recovered. (SX 205). Finally, State's Exhibit 206 included two videos taken from the phone extract in State's Exhibit 205. (R.R. Vol. 10 at 195-6). These videos showed Appellant: 1) wearing sunglasses that appeared to be the same as the sunglasses left at the crime scene (SX 50); 2) holding a phone that appeared similar to the phone that was ultimately separated from its battery and plastic backing (SX 52, 141); and 3) displaying and discussing a .380 pistol that was never recovered by police, but, based on shell casings found at the crime scene, would have been consistent with a weapon the assailants used in the home invasion. (RR Vol. 10 at 198-200).

Appellant filed a pre-trial motion to suppress the search of all of the electronic devices in Defendant's Exhibit 2 and 3 and the trial court denied Appellant's motion *in toto*. (RR. 4 at 27); (C.R. 53-69).

B. Standard of Review

Texas Code of Criminal Procedure Article 18.0215 authorizes the warrantless search of electronic devices found in the possession of a person being arrested for a felony. TEX. CODE CRIM. PROC. Art. 18.0215(d)(3)(A). But this statutory authorization contemplates that police will still apply for a warrant "as soon as practicable after a search is conducted" and requires suppression of any recovered

evidence if the judge "declines to issue the warrant." TEX. CODE CRIM. PROC. Art. 18.0215(e). Probable cause to search a specific electronic device is still required and statutory authority, regardless of whether it is applied retroactively, does not impact a defendant's substantive right to be free from unreasonable searches. *Ex parte Davis*, 947 S.W.2d 216, 220 (Tex. Crim. App. 1996); *Ibarra v. State,* 11 S.W.3d 189, 192 (Tex. Crim. App. 1999). The legislature's police power is limited by the Constitution and it is the duty of the courts to determine, as a matter of law, whether the legislature's exercise of police power is reasonable. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Travelers' Ins. Co., v. Marshall*, 76 S.W.2d 1007, 1011-2 (1934); *Marbury v. Madison*, 5 U.S. 137, 176 (1803). And the United States Supreme Court has held that the warrantless search of a cell phone recovered incident to arrest is generally prohibited under the Fourth Amendment of the United States Constitution. *Riley v. California*, 134 S.Ct. 2473, 2494 (2014). The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV.

"The ultimate touchstone of the Fourth Amendment is 'reasonableness'." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Case law has determined that "(w)here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a

judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

A search warrant may not issue unless it is based on probable cause. U.S. CONST. AMEND. IV; TEX CONST. Art. I § 9; TEX. CODE CRIM. PROC. Art. 106. Under Texas law, "[n]o search warrant shall issue ... unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance" and "[a] sworn affidavit setting forth substantial facts establishing probable cause" is filed with the search-warrant request. TEX. CODE CRIM. PROC. Art. 18.01(b). Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that evidence of a crime will be found at the specified location. *Bonds v. State*, 403 S.W.3d 867, 872-3 (Tex. Crim. App. 2013). Probable cause is a flexible and non-demanding standard. *Id.* at 873. Although "probable cause" cannot be defined by a precise degree of probability, probable cause will not be found based on mere conclusory statements of an affiant's belief. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007). The issue is not whether there are other facts that could have been included in the affidavit; the focus is on the logical force of the facts that are included. *Id*. at 62.

When a trial court examines whether there is probable cause to support a search warrant, the trial court is restricted to the four corners of the affidavit. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). A probable cause affidavit must state with particularity what the State can and cannot search and "general searches are prohibited." *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). In addition to the prevention of general searches, the Fourth Amendment's particularity requirement "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his powers to search." *Id.* at 561. The Constitutional objectives of requiring a "particular" description of the place to be searched include: (1) ensuring that the officer searches the right place; (2) confirming that probable cause is, in fact, established for the place described in the warrant; (3) limiting the officer's discretion and narrowing the scope of his search; (4) minimizing the danger of mistakenly searching the person or property of an innocent bystander or property owner; and (5) informing the owner of the officer's authority to search that specific location. *Long v. State*, 132 S.W.3d 443, 447 (Tex. Crim. App. 2004). For an evidentiary search warrant, as here, the sworn affidavit must set forth facts sufficient to establish probable cause that: (1) a specific offense has been committed; (2) the specifically described property or items that are to be the subject of the search or seizure constitute evidence of that offense or evidence that a particular person committed that offense; and (3) the property or items constituting evidence to be searched for

or seized are located at or on the particular person, place, or thing to be searched. TEX. CODE CRIM. PROC. Art. 18.01(c), 18.02(a)(10).

In its most recent cases on point, this Honorable Court has found "(t)here is a fair probability or substantial chance that evidence of (the crime) would be found in the contents of a cell phone belonging to a suspect who had confessed to shooting the complainant and who exchanged numerous text messages and phone calls with the complainant around the time of the shooting." *Walker v. State*, 494 S.W.3d 905 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd.) (citing *Humaran v. State*, 478 S.W.3d 887, 899-900 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd.). And in *Humaran*, this Honorable Court upheld a search of a defendant's cell phone based on a co-defendant's confession that: 1) a phone was used in the commission of the offense; and 2) the co-defendant had acted together with the defendant to destroy evidence in the aftermath of the offense. 478 S.W.3d at 900. In both cases, the warrants appear to have a specific basis for suspecting the existence of specific communications within specific phones.

In *Franks v. Delaware*, the Supreme Court of the United States held that when the defendant makes a substantial preliminary showing that a warrant affidavit contains a false statement made knowingly, intentionally, or with reckless disregard for the truth and that statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. 438 U.S. 154, 155–56 (1978); *see also Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim.

App. 2007). If, at the hearing, the defendant establishes perjury or reckless disregard by a preponderance of the evidence, the false material is set aside. *Franks*, 438 U.S. at 156; *Harris*, 227 S.W.3d at 85.

Normally, a review of a trial court's decision on a motion to suppress is under a bifurcated standard, giving almost total deference to the trial court's findings of historical facts but reviewing *de novo* its application of the law to the facts. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). When the trial court is determining probable cause to support issuance of a search warrant, there are no credibility determinations; rather, the trial court is constrained to the four corners of the affidavit. *Id*. Accordingly, when reviewing the magistrate's decision to issue a warrant, an appellate court should normally apply a highly deferential standard because of the constitutional preference for searches to be conducted pursuant to a warrant. *Id*. As long as the magistrate had a substantial basis for concluding probable cause existed, that decision should be upheld. *Id*. A reviewing court may not analyze the affidavit in a "hyper-technical manner" and instead should interpret it in "a commonsensical and realistic manner," deferring to all reasonable inferences that the magistrate could have made. *Id*.; *Aguirre v. State*, 490 S.W.3d 102, 108 (Tex. App.—Houston [14th Dist.] 2016).

However, if a defendant establishes that a warrant affidavit contains a false statement made knowingly, intentionally or with reckless disregard for the truth, the reviewing court should no longer afford its usual deference to the magistrate because

the trial court's judgment "would have been based on facts that are no longer on the table," and there is "no way of telling the extent to which the excised portion influenced" the trial court's determination. *State v. Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015) (quoting *United States v. Kelley*, 482 F.3d 1047, 1051 (9th Cir. 2007)). When part of an affidavit must be excluded, a Court of Appeals must determine whether "the independently acquired and lawful information stated in the affidavit nevertheless clearly established probable cause." *Id*. If the remaining content of the affidavit does not still establish sufficient probable cause, the search warrant must be voided and evidence resulting from that search excluded. *Franks*, 438 U.S. at 156; *Harris*, 227 S.W.3d at 85.

The harm analysis for the erroneous admission of evidence obtained in violation of the Fourth Amendment of the United States Constitution or Article I Section 9 of the Texas Constitution is the standard described in Texas Rule of Appellate Procedure 44.2(a). Unless the reviewing court is convinced beyond a reasonable doubt that the constitutional error was harmless, reversal will be required. TEX. R. APP. PROC. 44.2(a). The task is to calculate, as nearly as possible, the probable impact of the error on the jury in light of the evidence adduced at trial. *Wappler v. State*, 183 S.W.3d 765, 777 (Tex. App.—Houston [1st Dist.] 2005 pet. ref'd.); *McCarthy v. State,* 65 S.W.3d 47, 55 (Tex. Crim. App. 2002). In applying the harmless error test, the primary question is whether there is a reasonable possibility that the error might have contributed to the conviction. *Mosley v. State*,

983 S.W.2d 249, 259 (Tex. Crim. App. 1998). An appellate court should not focus on the propriety of the outcome of the trial, but instead evaluate the record in a neutral, impartial and even-handed manner. *Vasquez v. State*, 484 S.W.3d 526, 532 (Tex. App.—Houston [1st Dist.] 2016, no pet.). A court should consider the nature of the error, the extent to which it was emphasized by the State, its collateral implications, and the weight a jury would likely assign it. *Id*. The analysis should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether beyond a reasonable doubt the particular error did not contribute to the conviction or punishment. *Id.* (citing *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011).

C. Argument

The supporting affidavit of an evidentiary search warrant must set forth facts sufficient to establish probable cause that: (1) a specific offense has been committed; (2) the specifically described property or items that are to be the subject of the search or seizure constitute evidence of that offense; and (3) the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. TEX. CODE CRIM. PROC. Art. 18.01(c), 18.02(a)(10). Appellant does not dispute that the search warrant affidavit in Defense Exhibit #2 establishes the first criterion—that there is probable cause to believe a specific offense was committed. The affidavit details how the home of Troy Dupuy was the subject of a home invasion robbery and it explains why Appellant was a

suspect of this offense. (DX 2, page 2). But Appellant asserts that probable cause did not exist to believe that any of the three cell phones recovered from Appellant's person would constitute nor contain evidence of the Dupuy home invasion. Additionally, Appellant complains that the warrant affidavit offers insufficient specificity identifying the location within the three phones where evidence was likely to be found. Thus, Appellant asserts that neither of the final two requirements for an evidentiary search warrant affidavit were established by the supporting affidavit in Defense Exhibit #2. TEX. CODE CRIM. PROC. Art. 18.01(c), 18.02(a)(10).

To begin the analysis, Appellant would note that nothing in the affidavit, other than the officer's generalized assumptions, connected the specified offense with the property to be searched. The most that could be discerned to connect the Dupuy home invasion with the three cell phones on Appellant's person was that: 1) Appellant was suspected of participating in the Dupuy home invasion; 2) the cell phones were recovered from Appellant's person several days after the Dupuy home invasion; and 3) the investigating officer, based on his "training and experience" and based on his "human experience" believed "the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily" and "individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." (DX 2 page 2). In essence then, the affidavit rested on the notion

that whenever anyone suspected of a crime is found with a cell phone, probable cause exists to believe that cell phone contains evidence of the suspected crime.

But, in this case, nothing in the affidavit indicates that any of the cell phones on Appellant's person, much less all of three of the cell phones on Appellant's person, were actually owned or even used by Appellant. Moreover, nothing specific in the affidavit indicates any of the cell phones, much less all three of them, were used to communicate about the Dupuy home invasion. Nothing in the affidavit identifies the phone numbers connected with the three cell phones found on Appellant's person and nothing connects the phones found on Appellant's person with any of the affidavit's other references to phones. For example, nothing connects the cell phones found on Appellant's person with phone numbers for Appellant that were provided by the "anonymous" tipster (confidential informant). (DX 2 page 2). Nothing in the affidavit even suggested Appellant and the tipster communicated over the phone at all, much less that they communicated using the phones found on Appellant's person. Indeed, the affidavit lacks any indication that the three phones found on Appellant's person were ever used to communicate with anyone about any particular matter. Other than Appellant's possession of the three phones, nothing in the affidavit even indicates the phones had ever been used.

To be sure, the affidavit does make passing reference to a broken cell phone, part of which was left at the scene of the offense, part of which was recovered from a nearby apartment at the time of Appellant's arrest. (DX 2, page 2); (SX 51, 52,

141). But this cell phone was not one of the phones found on Appellant's person and there is no evidence that the police even searched it.

As this Honorable Court has recognized, a nexus must exist between the property to be searched and the alleged offense being investigated. *Walker v. State*, 494 S.W.3d 905 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (citing *Humaran v. State*, 478 S.W.3d 887, 899-900 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd.). This nexus was evident in *Humaran* where the accused was implicated by her co-defendant and there was evidence that she had used her cell phone to attempt to destroy evidence. 478 S.W.3d at 899-900. The nexus was even more evident in *Walker*, where the supporting affidavit indicated the accused's cell phone had been left in the deceased complainant's car. 494 S.W.3d at 908-9. The *Walker* case would mirror the present situation if the police had been seeking to search the broken cell phone which, just as in *Walker*, was partially left at the scene of the crime. *Id.* But the cell phones in question, unlike the broken cell phone, were never connected with the offense by anything besides their physical proximity to Appellant at the time of his arrest. Further, Appellant's arrest took place several days after the offense in question. (DX 2, page 2). As a result, the supporting affidavit fails to establish a sufficient nexus between the three cell phones recovered from Appellant's person and the Dupuy home invasion.

Additionally, because the police had so little to connect the three cell phones with the offense, they likewise had little idea where within the three phones they

were likely to find anything of evidentiary value. As a result, the warrant affidavit sought a sweeping, unrestricted search of each of the three cell phones in the speculative hope that some evidence, somewhere within the electronic devices, might be found. (DX 2 page 2). No doubt much of the expansive language used in the warrant affidavit was boilerplate in nature, as the affidavit sought approval to search "CD-ROM's, CD's, DVD's, thumb drives. . . flash drives etc.…" (DX 2 page 2). None of these items were likely to be a part of a cell phone. But the boilerplate nature of the language reveals the thoughtlessness of the affiant's request and the absence of any tailoring in the search to be performed. The affiant sought to search:

> "…photographs/videos; text or multimedia messages (SMS and MMS); any call history or call logs; any emails, instant messaging or other forms of communication of which said phone is capable; Internet browsing history; any stored Global Positioning System (GPS) data; contact information including email addresses, physical addresses, mailing addresses, and phone numbers; any voicemail messages contained on said phone; any recordings contained on said phone; any social media posts or messaging, and any images associated thereto, including but not limited to that on Facebook, Twitter, and Instagram; any documents and/or evidence showing the identity of ownership and identity of the users of said described item(s); *computer files or fragments of files* (emphasis added); all tracking data and way points; CD-ROM's CD's, DVD's, thumb drives, SD cards, flash drives or any other equipment attached or embedded in the above described device that can be used to store electronic data, metadata and temporary files." (DX 2 page 3; DX 3 page 5).

Such a search hardly comports with the constitutional objectives of requiring a "particular" description of the place to be searched, which include confirming that probable cause is, in fact, established for the place described in the warrant and limiting the officer's discretion and narrowing the scope of his search. *Long v. State*,

132 S.W.3d 443, 447 (Tex. Crim. App. 2004). Especially considering the police were authorized to search anything that could qualify as "computer files or fragments of files," it is hard to identify anything within the three cell phones that would have been out of bounds. As a result, the search within these phones constituted a general search and the warrant was therefore impermissible. *Riley v. California*, 134 S.Ct. 2473, 2494-5 (2014); *Groh v. Ramirez,* 540 U.S. 557.

Finally, beyond authorizing a generalized search of three cell phones that had virtually no connection to the alleged offense, the warrant affidavit included intentionally deceptive information from the investigating officer. The trial court, in her findings of fact and conclusions of law, found "not credible" one specific portion of Detective D.A. Angstadt's testimony: that "he does not recall if he received the anonymous tip before or after his telephone conversation with (DEA Agent) SA Layne and that he did not know about a DEA confidential informant." (Trial Court Findings of Fact #28). Based on this "not credible" testimony, the trial court found Angstadt made an incomplete and not completely accurate statement "…with reckless disregard for the truth." (Trial Court Conclusions of Law #1). Specifically, the trial court found "Angstadt misled the magistrate in failing to disclose that the anonymous tipster was also the DEA confidential informant." (Trial Court Conclusions of Law #2).

However, the trial court noted no other deception on Angstadt's part and, citing *Janecka v. State*, the trial court concluded that Angstadt's misidentification of

the source in the search warrant's supporting affidavit "was not material as it pertains to probable cause." (Trial Court Conclusions of Law #2); 937 S.W.2d 456, 463 (Tex. Crim. App. 1996).

Appellant argues otherwise and would note that the misleading information Angstadt provided in the search warrant affidavits was more extensive than simply mis-describing the investigation's source as "anonymous." After misinforming the magistrate about the "anonymous" tipster, Angstadt built upon that lie and suggested it was the tipster's information that caused Angstadt to reach out to the Drug Enforcement Agency. (DX 2 page 2; DX 3 page 3). According to Angstadt's statements in the warrant affidavit, Angstadt specifically contacted the DEA because in his "training and experience as a narcotic, robbery and homicide investigator" he knew "persons who commit home invasions are commonly involved in the illegal narcotics trade." (DX 2 page 2; DX 3 page 3). The deception here is actually quite elaborate, if subtle. Angstadt could not avoid including information in the warrant affidavit about the DEA's involvement in the investigation. But Angstadt did not want to identify the "anonymous" tipster as a DEA informant. As a result, Angstadt had to fabricate a reason why the DEA was involved in a non-narcotic related investigation. To explain the DEA's involvement, Angstadt falsely he had called the DEA, which led to yet another question: Why would Angstadt seek out the DEA's assistance, as opposed to the assistance of any other law enforcement agency? To answer this question, Angstadt falsely claimed he sought out the DEA

based on "training and experience" connecting narcotic crimes with home invasions. According to Angstadt's statements in the warrant affidavit, Angstadt knew, based on his "training and experience," that "persons who commit home invasions are commonly involved in the illegal narcotics trade" and the narcotics connection led Angstadt to believe the DEA might be able to assist. (DX 2 page 2). Of course, all of this was a subterfuge and Angstadt's "training and experience" played no role whatsoever in connecting him with the DEA. Indeed, according to DEA agent testimony, Angstadt was initially uninterested when they called him and the DEA agents had to convince him that their informant's information might be valid. (RR. Vol. 2 at 19-20).

When a defendant establishes perjury or reckless disregard for the truth by a preponderance of the evidence, the false material is to be set aside. *Franks*, 438 U.S. at 156; *Harris*, 227 S.W.3d at 85. In this case, the following portion of the warrant's supporting affidavit should clearly be excised:

"On September 30, 2013, Dep D.A. Angstadt received an anonymous tip that an individual known as 'Jessie' was involved in the home invasion against the Complainant. The tipster provided two phone numbers for the suspect. Based on Dep. D.A. Angstadt's training and experience as a narcotic, robbery and homicide investigator, Dep D.A. Angstadt knew persons who commit home invasions are commonly involved in the illegal narcotics trade. Dep. D.A. Angstadt spoke to DEA Special Agent Michael Layne and requested SA Layne run the phone numbers through DEA data bases. Dep. D.A. Angstadt learned that one of the phone numbers belonged to Defendant Nelson Garcia Diaz."

The elimination of this language from the warrant affidavit would substantially diminish the already deficient nexus between the Dupuy home invasion and the three cell phones recovered several days later on Appellant's person. Without the excised language, there is no connection between the "anonymous" tipster and Appellant and there is no indication that Appellant, prior to his arrest, had multiple phone numbers. Further, with the false information eliminated from the supporting affidavit, Appellant's only connection to the Dupuy home invasion would be his DNA on the sunglasses left at the scene. (DX 2 page 2). In essence, the remaining portion of the affidavit would fail to sufficiently connect both Appellant and the three cell phones on his person, making the warrant doubly illegitimate. *Cf Taunton v. State*, 465 S.W.3d 816 (Tex. App.—Texarkana 2015, pet. ref'd.).

But, from another vantage, an even larger chunk of the search warrant affidavit might be removed based on Angstadt's deceptions. Angstadt clearly sought to deceive the magistrate when he suggested his "training and experience" led him to contact DEA. As a result, Angstadt's "training and experience" statements, which are scattered throughout the affidavit, should also be excised. And because Angstadt's "training and experience" was essential to the affidavit's viability, the warrant fails without these claims. Specifically, Angstadt claimed he had found:

> "through training and experience and also through regular human experience that the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily. Therefore, it is Dep. D.A.

Angstadt's opinion that stored communication probably exists within the seized cellular phones and computer, and the contents of these communications are probably relevant and material to the offenses committed. It is also the opinion of Dep. D.A. Angstadt that the contents of any identified stored communications, whether they are opened or unopened or listened to or un-listened to, are probably relevant and material to the investigation. Dep. D.A. Angstadt has also found through training and experience that individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." (DX 2 page 3; DX 3 page 5).

Without the above supporting language, the affidavit only establishes that Appellant was suspected of the Dupuy home invasion and had the three phones on his person at the time of his arrest several days after the offense. Imagine such a warrant being issued to search three houses to which Appellant had the keys at the time of arrest. Imagine if Appellant had 100 cell phones. Probable cause does not automatically exist to search every possession of a person simply because they are suspected of a crime. In *Riley,* the Supreme Court made clear that a warrant, based upon probable cause, is necessary in order to search a person's cell phone. 134 S.Ct. 2473, 2494 (2014). If probable cause to search necessarily existed every time a criminal suspect were arrested with a cell phone, *Riley* would be implicitly making a rubber stamp out of the judiciary. Moreover, Texas' legislative response to *Riley*, codified in Texas Code of Criminal Procedure 18.0215, permits the warrantless search of a cell phone found during the arrest of a suspected felon, but also provides for the possibility that the recovered evidence may be suppressed if probable cause to search the cell phone did not exist. TEX CODE CRIM. PROC. art. 18.0215(e). Clearly, probable cause to arrest and probable cause to search, while not mutually

exclusive, are also not the same thing and the existence of one does not necessarily mean the existence of the other. *Brown v. State*, 481 S.W.2d 106, 108 (Tex. Crim. App. 1972). In the present situation, probable cause may have existed to believe Appellant played a role in the Dupuy home invasion. But probable cause did not exist to believe the cell phones found several days later on his person would contain evidence of that crime. As a result, the trial court erred in denying Appellant's motion to suppress the evidence recovered from the three cell phones described in Defense Exhibit 2.

D. Harm Analysis

Appellant complains of a violation of the Fourth Amendment of the United States Constitution and Texas Constitution Article I Section 9. Unless the error was harmless beyond a reasonable doubt, reversal is required. TEX. R. APP. PROC. 44.2(a). When evaluating constitutional error, an appellate court should not focus on the propriety of the outcome of the trial, but instead evaluate the record in a neutral, impartial and even-handed manner. *Vasquez v. State*, 484 S.W.3d 526, 532 (Tex. App.—Houston [1st Dist.] 2016, no pet.). A court should consider the nature of the error, the extent to which it was emphasized by the State, its collateral implications, and the weight a jury would likely assign it. *Id*. The analysis should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether beyond a reasonable doubt the particular

error did not contribute to the conviction or punishment. *Id.* (citing *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011).

In the present case, the illegally obtained evidence from the cell phone searches yielded devastating results for Appellant. State's Exhibit 203, 204, 205 and 206 were all pieces of evidence recovered pursuant to the execution of the invalid search warrant in Defense Exhibit 2. This evidence showed Appellant in possession of the same idiosyncratic garb used in the home invasion—including a black Kelty backpack and other black clothes and shoes. (SX 203). It also connected Appellant with the paid informant who testified against him and it confirmed Appellant used the name, Jesse, as the informant knew him. (SX 204). The evidence located on the cell phones directly connected Appellant with the offense itself, showing his phone had been used to search for and review at least one media account of the incident. (SX 205). And the recovered evidence showed Appellant had sent several texts about his missing sunglasses in the aftermath of the Dupuy home invasion. (SX 205).

These pieces of evidence were emphasized by the State almost immediately in their closing arguments. (RR Vol. 11 page 52). And the results of the cell phone searches were mentioned more than fifteen times in the prosecutor's closing argument. (RR Vol. 11 at 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 72). Given the devastating nature of the evidence recovered from the impermissible search of the cell phones and the State's emphasis on this evidence, there can be little question

that the jury would have assigned a significant weight to it. *Id*. As a result, the admission of State's Exhibit 203-206 was not harmless beyond a reasonable doubt and reversal is required. TEX. R. APP. PROC. 44.2(a).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays to this Honorable Court that it reverse Appellant's conviction and remand Appellant's case to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9 of the Texas Rules Appellate Procedure, the undersigned counsel of record certifies that the brief contains 8,059 words.

/s/ Nicole DeBorde
NICOLE DEBORDE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via e-mail delivery through eFile.TXCourts.gov to Kim Ogg, Harris County District Attorney's Office, 1201 Franklin, Houston, Texas 77002, on this the 7th day of February, 2019.

/s/ Nicole DeBorde
NICOLE DEBORDE